



October 5, 2020

Via FOIA Online to:

National FOIA Office
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW (2310A)
Washington, DC 20460

Re: FOIA Request for Records Concerning Chlorpyrifos Registration

Dear FOIA Officer:

I write on behalf of the Natural Resources Defense Council (NRDC) to request disclosure of records pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, and applicable EPA regulations at 40 C.F.R. § 2.100-2.406.

I. Requested Records and Disclosure Method

Please produce all records¹ of communications (and references thereto) regarding the pesticide chlorpyrifos, between January 1, 2018 and the date the response to this request is provided, between EPA (or any EPA contractor, representative or agent) and:

- a. Any representative, contractor agent of, or person or entity otherwise funded by² Corteva;
- b. Any representative, contractor or agent of, or person or entity otherwise funded by Dow AgroSciences;
- c. Any representative, contractor or agent of, or person or entity otherwise funded by CropLife America or its member companies; and/or

¹ "Records" means anything denoted by the use of that word or its singular form in the text of FOIA and includes correspondence, minutes of meetings and a list of participants for those meetings, daily agendas and calendars, memoranda, notes, emails, notices, facsimiles, charts, tables, presentations, orders, filings, internal messaging systems, and other writings (handwritten, typed, electronic, or otherwise produced, reproduced, or stored). NRDC seeks responsive records in the possession, custody or control of any EPA office, including, but not limited to, Office of the Administrator, EPA Headquarters offices, and the Office of Pesticide Programs.

² A "person or entity otherwise funded by" a relevant entity, such as Corteva, is intended to include, for example, an academic who has received funding from Corteva, or an institution such as Exponent, even if they do not have a direct contractual or agency relationship with the named entity such as Corteva.

- d. Any representative, contractor or agent of, or person or entity otherwise funded by a private company or trade association.

Please either email responsive records to me at aljohnson@nrdc.org or email me to request a link where you can upload the records. Please note that my email account cannot accept .zip files.

Please release responsive records to me on a rolling basis, starting with records of communications with Corteva, Dow AgroSciences, and CropLife America. If you determine that any of the records I've described above are already publicly available, please let me know where to find them.

II. Request for a Fee Waiver (or Reduction)

NRDC requests that EPA waive any fee it would otherwise charge for searching for and producing the requested records. FOIA dictates that requested records be provided without charge "if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester." 5 U.S.C. § 552(a)(4)(A)(iii); *see also* 40 C.F.R. § 2.107(l)(1). As I explain below, NRDC's requested disclosure meets both requirements. NRDC is also "a representative of the news media" entitled to fee reduction. 5 U.S.C. § 552(a)(4)(A)(ii)(II); *see also* EPA, 40 C.F.R. § 2.107(c)(1)(iii)

A. NRDC Satisfies the First Fee Waiver Requirement

The disclosure requested here is "likely to contribute significantly to public understanding of the operations or activities of the government." 5 U.S.C. § 552(a)(4)(A)(iii); 40 C.F.R. § 2.107(l)(1). Each of the four factors used by EPA to evaluate the first fee waiver requirement indicates that a fee waiver is appropriate for this request. *See* 40 C.F.R. § 2.107(l)(2).

1. Subject of the request

The records requested here relate to EPA's obligation to protect the public from exposure to pesticides that may pose threats to human health, including chlorpyrifos, and its recent release of a revised risk assessment for chlorpyrifos. The requested records thus directly concern "the operations or activities of the government." EPA, 40 C.F.R. § 2.107(l)(2)(i).

2. Informative value of the records to be disclosed

The requested records are “likely to contribute to” the public’s understanding of government operations and activities. 40 C.F.R. § 2.107(l)(2)(ii). The public does not currently possess comprehensive information regarding the government’s role in addressing the public health risks associated with continued use of dangerous pesticides, including chlorpyrifos, and the extent to which its positions may be influenced by private industry. There is more than a reasonable likelihood that these records have informative value to the public because they will allow the public to understand more about private industry influence on the regulatory process for dangerous pesticides. The public has closely followed EPA’s reversal of its plan to end use of chlorpyrifos, and the documents requested will shed light on that reversal. *See Citizens for Responsibility & Ethics in Washington v. U.S. Dep’t of Health & Human Servs.*, 481 F. Supp. 2d 99, 109 (D.D.C. 2006).

3. Likely contribution to public understanding

Because NRDC is a “representative of the news media,” as explained in Part II.C below, EPA must presume that this disclosure is likely to contribute to public understanding of its subject. 40 C.F.R. § 2.107(l)(2)(iii). Even if NRDC were not a media requester, its expertise in the public health impacts of toxic chemicals, extensive communications capabilities, and proven history of dissemination of information of public interest—including information obtained from FOIA records requests—show that NRDC has the ability and will to use disclosed records to reach a broad audience of interested persons with any relevant and newsworthy information the records reveal. There is accordingly a strong likelihood that disclosure of the requested records will increase public understanding of the subject matter. *See Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1314 (D.C. Cir. 2003) (finding that a requester that specified multiple channels of dissemination and estimated viewership numbers demonstrated a likelihood of contributing to public understanding of government operations and activities).

NRDC’s more than three million members and online activists are “a reasonably broad audience of persons interested in the subject” of toxic chemicals and industry influence on public policy. 40 C.F.R. § 2.107(l)(2)(iii). When this group is combined with the other audiences for the numerous publications and other platforms to which NRDC contributes, the likely audience of interested persons to be reached is certainly “reasonably broad.” C.F.R. § 2.107(l)(2)(iii).

NRDC can disseminate newsworthy information collected through this FOIA request to its members, online activists and other members of the public through many channels, free of charge. As of summer 2020, these channels include:

- NRDC's website, <http://www.nrdc.org> (sample homepage at Att. 1), is updated daily and draws approximately 1.96 million page views and 982,000 unique visitors per month. The website features NRDC staff blogs, original reporting of environmental news stories, and more.
- NRDC's Activist email list includes more than 1.7 million members and online activists who receive regular communications on urgent environmental issues. (sample email at Att. 2) This information is also made available through NRDC's online Action Center at <https://www.nrdc.org/actions> (Att. 3).
- NRDC publishes a monthly electronic environmental newsletter, *NRDC Insider*, which is distributed by email to more than 1,128,420 subscribers.
- NRDC also publishes a quarterly environmental newsletter, *Nature's Voice*, <https://www.nrdc.org/natures-voice>, which is distributed to more than 370,000 subscribers (sample at Att. 4).
- NRDC updates and maintains several social media accounts with tens to hundreds of thousands of followers. Its major accounts include Facebook (947,358 followers) (Att. 5), Twitter (336,443 followers) (Att. 6), Instagram (289,855 followers) (Att. 7), YouTube (23,300 subscribers) (Att. 8), and LinkedIn (34,553 followers) (Att. 9).
- NRDC also uses Medium (sample page at Att. 10) and the Huffington Post (sample page at Att. 11) as distribution channels for our content.

NRDC staff also write papers and reports; provide legislative testimony; present at conferences; direct and produce documentary films; and contribute to national radio, television, newspaper, magazine and web stories and academic journals. Some examples of these contributions include:

- Article, "Interior Department Worked Behind the Scenes with Energy Industry to Reverse Royalties Rule," *Wash. Post*, Oct. 6, 2017 (discussing documents obtained through a FOIA request submitted by NRDC and quoting NRDC Senior Policy Advocate Theo Spencer) (Att. 12);

- Documentary, *Sonic Sea* (2016), featured on the Discovery Channel (directed and produced by NRDC Deputy Director of Communications Daniel Hinerfeld) (Att. 13);
- Research article, “The Requirement to Rebuild US Fish Stocks: Is it Working?” *Marine Policy*, July 2014 (co-authored by NRDC Oceans Program Senior Scientist Lisa Suatoni and Senior Attorney Brad Sewell) (Att. 14);
- Issue brief, “The Untapped Potential of California’s Water Supply: Efficiency, Reuse, and Stormwater,” June 2014 (co-authored by NRDC Water Program Senior Attorney Kate Poole and Senior Policy Analyst Ed Osann) (Att. 15); *see also* “Saving Water in California,” *N.Y. Times*, July 9, 2014 (discussing the report’s estimates) (Att. 16);
- Congressional testimony, David Doniger, NRDC Climate and Air Program Policy Director and Senior Attorney, before the United States House Subcommittee on Energy and Power, June 19, 2012 (Att. 17);
- Conference brochure, “World Business Summit on Climate Change,” May 2009 (with former NRDC Director for Market Innovation Rick Duke) (excerpt at Att. 18).

NRDC’s legal, scientific, and other experts have a history of using information obtained through FOIA requests to inform the public about a variety of issues, including energy policy, climate change, wildlife protection, nuclear weapons, pesticides, drinking water safety, and air quality. For example:

- Through FOIA and other sources, NRDC obtained information on levels of arsenic in drinking water nationwide and used it in a report, *Arsenic and Old Laws* (2000) (excerpt at Att. 19). The report explained how interested members of the public could learn more about arsenic in their own drinking water supplies. *Id.* *See also* Steve LaRue, “EPA Aims to Cut Levels of Arsenic in Well Water,” *San Diego Union-Tribune*, June 5, 2000, at B1 (referencing NRDC’s report) (Att. 20).
- Through FOIA, NRDC obtained an ExxonMobil memorandum advocating the replacement of the sitting head of the Intergovernmental Panel on Climate Change and used the document to help inform the public about what may have been behind the Bush administration’s decision to replace Dr. Robert Watson. *See* NRDC Press Release and attached Exxon memorandum, “Confidential Papers Show Exxon Hand in White House Move to Oust Top Scientist from International Global Warming

Panel,” Apr. 3, 2002 (Att. 21). *See also* Elizabeth Shogren, “Charges Fly Over Science Panel Pick,” *L.A. Times*, Apr. 4, 2002, at A19 (Att. 22).

- NRDC scientists have used information obtained through FOIA to publish analyses of the United States’ and other nations’ nuclear weapons programs. In 2004, for example, NRDC scientists incorporated information obtained through FOIA into a feature article on the United States’ plans to deploy a ballistic missile system and the implications for global security. Hans M. Kristensen, Matthew G. McKinzie, and Robert S. Norris, “The Protection Paradox,” *Bulletin of Atomic Scientists*, Mar./Apr. 2004 (Att. 23).
- NRDC has used White House documents obtained through FOIA and other sources to inform the public about EPA’s decision not to protect wildlife and workers from the pesticide atrazine in the face of industry pressure. *See Still Poisoning the Well: Atrazine Continues to Contaminate Surface Water and Drinking Water in the United States* (Apr. 2010) (update to 2009 report), <http://www.nrdc.org/health/atrazine/files/atrazine10.pdf> (excerpt at Att. 24). *See also* William Souder, “It’s Not Easy Being Green: Are Weed-Killers Turning Frogs into Hermaphrodites?” *Harper’s Magazine*, Aug. 1, 2006 (referencing documents obtained and posted online by NRDC) (Att. 25).
- NRDC obtained, through FOIA, FDA review documents on the nontherapeutic use of antibiotic additives in livestock and poultry feed. NRDC used these documents to publish a January 2014 report, titled *Playing Chicken with Antibiotics*, that reveals decades of FDA hesitancy to ensure the safety of these drug additives (Att. 26). *See also* P.J. Huffstutter and Brian Grow, “Drug Critic Slams FDA over Antibiotic Oversight in Meat Production,” *Reuters*, Jan. 27, 2014 (discussing report) (Att. 27).
- In April 2014, NRDC used FOIA documents to prepare a report on potentially unsafe chemicals added to food, without FDA oversight or public notification. The report, *Generally Recognized as Secret: Chemicals Added to Food in the United States*, reveals concerns within the agency about several chemicals used as ingredients in food that manufacturers claim are “generally recognized as safe” (Att. 28). *See also* Kimberly Kindy, “Are Secret, Dangerous Ingredients in Your Food?” *Wash. Post*, Apr. 7, 2014 (discussing report) (Att. 29).
- NRDC obtained through FOIA and publicized emails between the Trump transition team and industry officials regarding reversal of Obama-era preliminary restrictions

on the proposed Pebble Mine. This cast light on an issue of considerable public interest. *See, e.g.*, Kevin Bogardus and Dylan Brown, "'Homework Assignment' — How Pebble Lobbied Trump's EPA," *E&E News*, June 8, 2017 (Att. 30).

In short, NRDC has proven its ability to digest, synthesize, and quickly disseminate to a broad audience newsworthy information gleaned through FOIA requests like this one.

4. Significance of the contribution to public understanding

The records requested here shed light on a matter of considerable public interest and concern: EPA's failure to protect the public from exposure to dangerous pesticides, including the brain-toxic pesticide chlorpyrifos, and the extent to which private industry has influenced EPA's approach. EPA's repeated refusal to limit chlorpyrifos use, including its recent decision to ignore a significant body of scientific research, has received ongoing media coverage and been highlighted in NRDC publications. *See* Lisa Friedman, *E.P.A. Rejects Its Own Findings That a Pesticide Harms Children's Brains*, NY Times (Sept. 23, 2020) (attached as Exhibit A); Lisa Friedman, *E.P.A. Won't Ban Chlorpyrifos, Pesticide Tied to Children's Health Problems*, NY Times (July 18, 2019) (attached as Exhibit B); Miles O'Brien, *The EPA isn't taking its own advice on a pesticide that causes brain damage in children*, PBS News Hour (Aug. 29, 2018), www.pbs.org/newshour/show/the-epa-isnt-taking-its-own-advice-on-a-pesticide-that-causes-brain-damage-in-children#transcript, (transcript attached as Exhibit C); NRDC, *NRDC Takes EPA to Court - Again - to Protect Children's Health* (Aug. 7, 2019) (attached as Exhibit D); Allison Johnson & Miriam Rotkin-Ellman, *EPA Won't Protect Our Kids. Will California?* (Sept. 24, 2018) (attached as Exhibit E); NRDC, *Ban Chlorpyrifos*, www.nrdc.org/chlorpyrifos (attached as Exhibit F). EPA's latest risk assessment walks back protective measures and aligns more closely with industry positions (*see* Exhibit A); public understanding of the influence of financial interests on EPA's review process for chlorpyrifos and other dangerous pesticides would be significantly enhanced by disclosure of the requested records concerning communications with pesticide companies and private industry representatives. Disclosure would help the public to more effectively evaluate EPA's recent changes to the chlorpyrifos risk assessment, and to better understand and evaluate EPA's decisions to delay a ban on chlorpyrifos.

B. NRDC Satisfies the Second Fee Waiver Requirement

Disclosure of the requested records would also satisfy the second prerequisite of a fee waiver request because NRDC does not have any commercial interest that would be furthered by the disclosure. 5 U.S.C. § 552(a)(4)(A)(iii); EPA, 40 C.F.R. § 2.107(l)(1), (3).

NRDC is a not-for-profit organization; it uses information obtained under FOIA for its own public-information and advocacy purposes and does not resell this information. “Congress amended FOIA to ensure that it be ‘liberally construed in favor of waivers for noncommercial requesters.’” *Rossotti*, 326 F.3d at 1312 (internal citation omitted); see *Natural Res. Def. Council v. United States Env’tl. Prot. Agency*, 581 F. Supp. 2d 491, 498 (S.D.N.Y. 2008). NRDC wishes to serve the public by reviewing, analyzing, and disclosing newsworthy and presently non-public information about EPA’s failure to protect the public from chlorpyrifos exposure. As noted at Part II.A, any EPA communications with industry about chlorpyrifos relate to a matter of considerable public interest and concern. Disclosure of the requested records will contribute significantly to public understanding of industry influence on EPA’s decision to delay a ban on chlorpyrifos and associated threats to human health and the environment.

C. NRDC Is a Media Requester

Even if NRDC were not entitled to a public interest waiver of all costs and fees, it would be a representative of the news media entitled to a reduction of fees under FOIA, 5 U.S.C. § 552(a)(4)(A)(ii), and EPA’s FOIA regulations. 40 C.F.R. § 2.107(c)(1)(iii); see also 40 C.F.R. § 2.107(b)(6) (defining “[r]epresentative of the news media”). A representative of the news media is “any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience.” 5 U.S.C. § 552(a)(4)(A)(ii); see also *Elec. Privacy Info. Ctr. v. Dep’t of Def.*, 241 F. Supp. 2d 5, 6, 11-15 (D.D.C. 2003) (a “non-profit public interest organization” qualifies as a representative of the news media under FOIA where it publishes books and newsletters on issues of current interest to the public); Letter from Alexander C. Morris, FOIA Officer, United States Dep’t of Energy, to Joshua Berman, NRDC (Feb. 10, 2011) (Att. 11) (granting NRDC media requester status).

NRDC is in part organized and operated to gather and publish or transmit news to the public. For example, NRDC publishes original reporting of environmental news stories on its website at <https://www.nrdc.org/stories> and at <https://www.nrdc.org/onearth>. As explained in Part II.A, NRDC also distributes regular newsletters, *NRDC Insider* and *Nature’s Voice*, for hundreds of thousands of subscribers; issues other action alerts, public reports and analyses; and maintains free online libraries of these publications. See EPA, 40 C.F.R. § 2.107(b)(6) (“Examples of news media include . . . publishers of periodicals.”). NRDC also maintains a significant additional communications presence through its staff blogs on www.nrdc.org, which are updated regularly and feature writing about current environmental issues; through news messaging on Twitter, Instagram, and Facebook; and through content distributed to outlets such as Medium. See OPEN Government Act of 2007,

Pub. L. No. 110-175, § 3, 121 Stat. 2524 (2007) (codified at 5 U.S.C. § 552(a)(4)(A)(ii)) (clarifying that “as methods of news delivery evolve . . . such alternative media shall be considered to be news-media entities”). These and the other communications channels referenced earlier in this letter routinely include information about current events of interest to the readership and the public. NRDC employs more than fifty specialized communications staff, including accomplished journalists and editors, and numerous other advocates able to disseminate, through these and other channels, newsworthy information acquired through FOIA.

Organizations with NRDC’s characteristics “are regularly granted news representative status.” *Serv. Women’s Action Network v. Dep’t of Def.*, 888 F. Supp. 2d 282, 287-88 (D. Conn. 2012) (according media requester status to the American Civil Liberties Union); *see also Cause of Action v. Fed. Trade Comm’n*, 961 F. Supp. 2d 142, 163 (D.D.C. 2013) (explaining that an organization can qualify for media-requester status if it “distributes work to an audience and is especially organized around doing so”).

III. Conclusion

Thank you for your help. Please email or call me with questions.

Sincerely,



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Enclosures in support of fee waiver and reduction requests:

Attachments 1 through 30
Exhibits A through F